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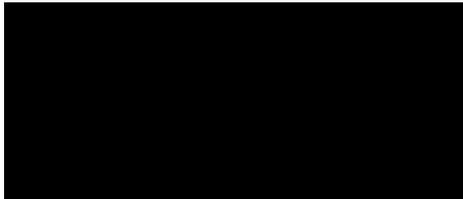
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File: SRC 04 127 50799 Office: TEXAS SERVICE CENTER Date: **AUG 01 2006**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend its authorization to employ its "Director of Systems Manager" as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Florida corporation that claims to be engaged in consulting and management of computer systems. The petitioner claims that it is a subsidiary of C Tres Arquitectura C.A., located in Guarenas, Venezuela. The beneficiary was initially granted a one-year period in L-1A status to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for a three-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the U.S. company has been doing business for the previous year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary allocates at least 75 percent of his time to "traditional and indisputable executive functions" that clearly fall under the statutory definition of "executive capacity," and also manages the petitioner's "essential functions." Counsel further asserts that the director placed undue emphasis on the size of the U.S. company and the number of employees to be supervised by the beneficiary. Finally, counsel contends that the petitioner submitted sufficient evidence to establish that the U.S. company was doing business for the previous year. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in the present matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on April 1, 2004. The petitioner stated on Form I-129 that it had four employees and noted its intention to employ the beneficiary as its "Director of Systems Manager." In a letter dated March 29, 2004, the petitioner described the beneficiary's duties as "President" as follows:

[The beneficiary] is responsible for the management and direction of all sales and marketing strategies and activities, including product positioning within the diverse and complex Miami market. [The beneficiary] assures that each of the U.S. Company's managers is properly trained, with the goal of achieving a uniform and coherent sales, marketing, technical support and customer service programs. [The beneficiary] manages these managers; they in turn manage their in-country staffs. They also report to and take instructions from [the petitioner's] managers in Miami, who in return report to [the beneficiary].

\* \* \*

As President of [the petitioner], [the beneficiary] plans, develops and establishes the policies and objectives of the business organization. He confers with company managers to plan business objectives and to develop organizational policies and procedures for attaining those objectives. Also as President, he revises activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. From there he directs and coordinates the formulation of sales,

marketing, and business development and financial programs to provide funding and direction for new or continuing operations. This past year, he also evaluated the performances of managers in compliance with established policies and objectives of the Parent Company. Since being president, [the beneficiary] has employed his experience as an executive to improve upon these functions. As president, he has hired, training and supervised managerial staff, as well as approved and oversaw the implementation of all company polices and procedures. He has executed the business plan with good skill and judgment.

[The beneficiary] has complete responsibility for the Company's budget as well as profits and losses, and as such, he reviews activity reports and financial statements to determine the Company's progress in attaining its objectives, and takes measures to assure that those objectives are reached within established timetables. He directs and coordinates the Company's financial and budget activities to fund operations, maximize return on purchases, and increase efficiency. He plans and develops public relations policies and programs designed to maintain a high level of customer satisfaction, and in order to attract new customers. He evaluates the performance of his managers, and develops strategies and policies designed to provide incentives for improved performance and increased revenues. . . . In more general terms, [the beneficiary] performs the following functions:

- Directs, plans and implements policies and objectives of the U.S. Company.
- Confers with managerial staff members to establish policies and formulate plans.
- Analyzes operations to evaluate the performance of the company and staff and to determine areas of cost reduction and program improvement.
- Assigns or delegates responsibilities to subordinates.
- Directs and coordinates activities the departments responsible for pricing, sales, and delivery of products and services.

The petitioner described its staffing as follows:

The sales and customer service and project departments work under the supervision of [the beneficiary], each handling the specialty functions assigned to them and with their area of expertise network. . . .The U.S. Company's managers are compensated either as full time employees or will [be] provided 1099s for their service. [REDACTED] was hired in December, 2003 as Sales Manager. [REDACTED] was hired in January 2004, as head of the Projects Department, and is paid as an independent contractor. [REDACTED] was also hired in January 2004, and is in charge of Customer Service, also on a contacted [sic] basis at this time, although he works almost 40 hours per week at this point.

Since its inception, the U.S. Company has worked closely with [REDACTED] C.P.A., who serves as its outside Controller/Auditor.

The director issued a request for additional evidence on April 17, 2004, instructing the petitioner to submit, in part: (1) a definitive statement describing the beneficiary's U.S. employment including his position title, a list

of all duties, the percentage of time spent on each duty, the number of subordinate managers/supervisors who report directly to the beneficiary, and a brief description of their job titles, educational background and duties, or, if the beneficiary does not supervise employees, an explanation as to the essential function managed by the beneficiary; (2) an explanation of who provides the product sales/services or produces the product of the business; (3) copies of the company's quarterly tax returns for the last four quarters with proof of payments made to the IRS; and (4) payroll records for the U.S. company from April 2, 2003 through April 2004.

The petitioner, through counsel, responded to the director's request on July 12, 2004. In response to the director's request for a more detailed description of the beneficiary's duties, the petitioner noted that the beneficiary serves as chairman of the board and president, and provided separate job descriptions for each position. The petitioner stated that as chairman of the board, the beneficiary: establishes an agenda for each Board meeting (15%); chairs all meetings of the Board (10%); initiates discussion of each topic on the agenda and calls for a vote of the Board (5%); provides leadership (30%); ensures that the Board is provided with full information (10%); facilitates and encourages constructive and useful communication (10%); recommends to the Board for its approval an agenda for each shareholders' meeting (10%); ensures that minutes of all meets are properly recorded (5%); and ensures that all procedural formalities pertaining to quorum, notice, voting and resolutions are complied with at each Board and Shareholder Meeting (5%).

The petitioner provided the following summary of the beneficiary's duties as president and the percentage of time devoted to each duty:

- Establishing the overall policies and direction of the Company (25%)
- Establishes the Company's budget and projects profits and losses (15%)
- Public Relations (10%)
- Evaluates the performance of his managers (10%)
- Establishes policies and guidelines for the managers in charge of these functions (5%)
- Confers with board members company officers and mangers [sic] to establish policies, formulate plans, and seek board approval for major decisions (5%)
- Establishes internal control procedures (5%)
- Directs training of staff (5%)
- Directs activities of the Company to plan procedures, establish responsibilities and coordinate functions (5%)
- Develops and directs the projection of the Company's image in the computer markets which he has targeted for penetration and expansion (5%)
- Plans and advises regarding projects for the installation of computer centers, networks, SAP R3 (version 4.6C), and Flexline 5.0 (5%)
- Plans and coordinates web page design projects and sales regarding design proposals and thereafter implementation of the project (5%)

The petitioner submitted the requested organizational chart showing the beneficiary as chairman of the board of directors and president over an administration department headed by [REDACTED] a sales department headed by [REDACTED] a project department headed by [REDACTED] and a customer service department headed by [REDACTED]. The petitioner stated that the accounting function, including "a substantial

portion of office administrative functions," is outsourced to the company's accountant, [REDACTED] and his assistant, and noted that it had begun using the accountant's services on August 29, 2003. The petitioner provided job descriptions for the accountant and his assistant, identifying their positions as "controller" and "assistant controller and administrative support specialist," respectively.

The petitioner indicated that its sales and marketing manager [REDACTED] was hired on December 31, 2003 and stated that he performs the sales, marketing and customer service functions under the beneficiary's supervision. The petitioner stated that the company hired [REDACTED] as its computer and information systems specialist on August 7, 2003, and noted that he has a "university degree" in computer science. The petitioner stated that his position is "akin to a Information System Manager." The petitioner also stated that the company hired [REDACTED] as its technical service manager on July 30, 2003 and noted his completion of a "university degree." The petitioner provided position descriptions for these three positions, including a breakdown of the percentage of time each employee devotes to his prospective job duties. As the petitioner's response to the request for evidence is part of the record, these job descriptions will not be repeated here.

With respect to the beneficiary's subordinates, the petitioner indicated that they are all professionals engaged in providing "highly specialized products and services. The effective provision of these products and services require the theoretical and practical application of a body of highly specialized knowledge which is ordinarily only possessed by an individual with a University Degree in specialty."

The petitioner submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the last quarter of 2003 and first quarter of 2004, and its Florida Forms UCT-6, Employer's Quarterly Report, for the same periods, which confirm the employment of the beneficiary and the sales and marketing manager. The sales and marketing manager received wages of \$433.50 for the quarter ended on March 31, 2004. The petitioner also provided its 2003 IRS Forms W-2, Wage and Tax Statement, confirming wages paid to the beneficiary (\$6,000) and the sales and marketing manager (\$513). The petitioner did not submit copies of IRS Forms 1099 evidencing wages paid to contract employees.

Finally, in response to the director's requests for the petitioner's payroll records, the petitioner provided copies of checks dated from July 2003 through April 2004, ostensibly paid to the order of the beneficiary, [REDACTED] and [REDACTED]. The petitioner did not provide copies of canceled checks showing the recipients and bank's endorsement on the reverse side. As discussed further below, the majority of these checks appear to have been altered.

The director denied the petition on December 15, 2004 concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director determined that the petitioner's descriptions of the beneficiary's duties are not executive or managerial in nature. The director observed that the petitioner's evidence establishes that the company employed only the beneficiary and the sales and marketing manager at the time the petition was filed. The director found that the petitioner had not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional or managerial employees who would relieve him from performing the day to day services of the organization. The director further noted that no documentary evidence had been submitted to support the petitioner's claim that [REDACTED] and [REDACTED]

██████████ had started employment with the petitioner on the claimed dates. The director determined that the evidence submitted demonstrates that, given the current structure of the company, the beneficiary will continue to perform the day-to-day services of the organization.

On appeal, counsel for the petitioner reiterates the beneficiary's job duties and asserts that the beneficiary will serve in a primarily executive capacity. Counsel references the regulatory definitions of managerial and executive capacity, and claims that the director's "request that the petitioner prove that the position isolates the beneficiary from the day-to-day running of the business is actually part of neither definition." Counsel asserts that 75 percent of the beneficiary's time as chairman and 85 percent of his time as president of the company is devoted to duties that "fall squarely within the definition of executive duties." Counsel notes that the definition of executive capacity makes no reference to the supervision of other employees, and further asserts that the petitioner provided documentation relating to the beneficiary's direction of essential functions.

Counsel further contends that the director erroneously based the denial, in part, on the fact that the petitioner did not provide proof of specific dates of employment for certain professional employees, noting that the director "does not question the existence and employment of these four professional individuals." Counsel asserts: "It is respectfully submitted that the beneficiary's executive and/or essential function duties render moot any need to prove that certain employees report directly to the beneficiary."

Counsel asserts that the director improperly relied on the small size of the petitioning company, noting that the Congress expanded the L-1A classification with the inclusion of "functional" managers in 1990, placing more emphasis on the management of an essential function rather than on the size of the company. Counsel cites several unpublished AAO decisions to stand for the proposition that "it is unnecessary for L-1A executives or managers [sic] to be employees of a large organization, to operate 'at a senior level' and that there are other employees who will actually execute the duties of the function."

Counsel concludes that the petitioner "has provided specific, detailed descriptions for the beneficiary's duties, demonstrating that they are primarily executive in nature and involve essential functions."

Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity in the United States. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner claims that the beneficiary will be employed in a primarily executive capacity. However, although the petitioner has provided lengthy descriptions of the beneficiary's duties, the totality of the record does not support a conclusion that he will perform primarily executive duties. The petitioner asserts that the beneficiary will divide his time between duties as chairman of the board and president; however, nearly all of the duties described for these roles are vague and general in nature, and merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner states that the beneficiary "plans, develops and establishes the policies and objectives

of the organization,” manages and directs the operations of the company, and “implements strategies for the attainment of corporate objectives.” Upon review, the petitioner’s initial description of the beneficiary’s duties appears to be largely composed of language taken almost verbatim from the definition of “president” found in the U.S. Department of Labor’s *Dictionary of Occupational Titles*. Generic job descriptions found in Department of Labor publications have no bearing on an assessment of this beneficiary’s duties within the context of the petitioner’s business, and the petitioner cannot satisfy its burden of proof by paraphrasing such descriptions; the regulations require the petitioner to submit a detailed description of the beneficiary’s actual duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990).

The job description submitted in response to the director’s request for evidence also failed to identify what the beneficiary would do on a day-to-day basis under the extended petition, as the petitioner again referred to the beneficiary’s broad responsibilities for “establishing the overall policies and direction of the company,” projecting profits and losses, establishing policies and guidelines for managers, “directing activities to plan procedures, establish responsibilities and coordinate functions,” “establish internal control procedures,” and conferring with board members to establish policies and plans. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). Furthermore the petitioner’s descriptions of the beneficiary’s duties, which suggest that the beneficiary devotes the majority of his time to attending board meets and establishing and implementing the overall goals and policies of the company, are simply not credible when considered in the context of a service-oriented business in which the beneficiary is the only full-time employee. The provided job descriptions do not allow the AAO to understand what duties the beneficiary actually performs on a day-to-day basis, such that they can be classified as managerial or executive in nature.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

Accordingly, while the AAO does not doubt that the beneficiary exercises discretion over the day-to-day operations of the company as its highest-ranking employee, the record does not establish that his actual duties are primarily executive in nature. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the

management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While counsel correctly states that the definition of executive capacity does not make any reference to the supervision of other employees, it is clearly necessary for the petitioner to establish that someone other than the beneficiary is responsible for performing the company's routine day-to-day operational and administrative duties. The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible depiction of the beneficiary's role within the organizational hierarchy. The record does not demonstrate that the beneficiary has a sufficient number of employees in the United States employed full-time who could promote and sell the petitioner's products and services, perform routine administrative and operational tasks, or provide the petitioner's array of information technology consulting services. The petitioner's general description of the beneficiary's duties and the lack of other personnel to perform the company's service-oriented tasks prohibit a finding that the beneficiary will perform in a primarily managerial or executive capacity.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Furthermore, contrary to counsel's assertions that the petitioner's staffing levels are irrelevant, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Although counsel objected to the director's references to the company's staffing levels, the petitioner was required by regulation to submit a statement describing the staffing of the company, including the number of employees and types of positions held and accompanied by evidence of wages paid to employees. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

The petitioner has not provided credible evidence of the wages paid to its employees. As mentioned above, every check issued to the order of [REDACTED] and [REDACTED] appears to have been altered. It is clear that correction fluid has been used to obscure the name of the recipient of each check, and [REDACTED] and [REDACTED] names have been written over in ink that appears clearly darker in many of the photocopies. It is also evident that correction fluid has been utilized on the "memo" section of some of the issued checks. Finally, one of the checks issued to the beneficiary (#1042) and one of the checks issued to [REDACTED] (number illegible) have also been altered in a similar fashion. Doubt cast on any aspect of the petitioner's proof, may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the petitioner's submission of altered documents to establish a key element of eligibility, the AAO will give little weight to the petitioner's unsupported representations regarding the beneficiary's U.S. employment. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. *See e.g., Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Furthermore, willful misrepresentation in these proceedings may render the beneficiary inadmissible to the United States. Section 212(a)(6)(C) of the Act.

Of the checks which do not appear to have been altered, there is one check issued to [REDACTED] (\$275), two checks issued to [REDACTED] (\$436.76, \$400.34), and two checks issued to the beneficiary. The petitioner has not submitted documentary evidence to establish that [REDACTED] was regularly employed as the petitioner's "controller" although it appears that he did prepare the petitioner's quarterly tax filings. There is no evidence to suggest that his services were utilized for other functions. At most, [REDACTED] appears to have been employed on only a part-time basis as the petitioner's "sales and marketing manager."

The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company, most notably the petitioner's computer systems consulting and support services and everyday administrative functions. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a president who performs primarily executive duties and a part-time sales and marketing employee. Collectively, the evidence brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As the beneficiary is the petitioner's sole full-time employee, it is reasonable to conclude, and has not been shown to be otherwise, that he must necessarily perform a wide variety of administrative and operational functions, including providing services to clients. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel asserts on appeal that the beneficiary "manages essential functions" and suggests that pursuant to the addition of the concept of a "functional" manager to the Immigration and Nationality Act in 1990, it is not

necessary to show that the beneficiary supervises others or that there are other employees who will actually execute the duties of the function.

Counsel's contention that the director's interpretation of managerial capacity does not allow for the alternative basis of managing an essential function is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the beneficiary's duties that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. As discussed above, the petitioner has not provided a credible or detailed account of the beneficiary's actual duties, nor did it identify the "essential functions" managed by the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, in such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish management capacity. However, the statutory requirement that a beneficiary "primarily" perform in a managerial or executive capacity remained unchanged. Moreover, federal courts continue to give deference to CIS's interpretation of the Immigration Act of 1990 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305 (Table), 1995 WL 576839 at \*5 (9<sup>th</sup> Cir. 1995) (unpublished) (citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel further refers to several unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial or executive capacity even though he was the sole employee or employed by a very small company. Counsel has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished matters. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel states on appeal that the petitioner will expand into other business areas and hire additional employees in the future as needed. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the U.S. company has been doing business in the United States for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines “doing business” as the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The beneficiary was previously granted L-1A classification for a one-year period in order to open a new office in the United States. The previous petition, SRC 03 110 50731, was approved on April 2, 2003 with a validity period of April 2, 2003 through April 1, 2004. The beneficiary did not apply for a change of status and was not in the United States when the petition was approved.

In support of the I-129 petition, the petitioner provided: a balance sheets and income statement for the 2003 year, showing total revenue of \$22,448.69; its income statement for the first two months of 2004 showing total revenue of \$15,004.86; its Form 940-EZ and Form W-3 for the 2003 year; its IRS Form 941, Employer’s Quarterly Tax Return, and Florida Form UCT-6, Employer’s Quarterly Wage Report, for the fourth quarter of 2003; bank statements for the period April 2003 through February 2004; receipts for rent payments dating back to April 2003; copies of telephone bills dating back to May 2003; copies of invoices issued by the petitioning company, dated June 2003 through March 2004; invoices for products purchased by the U.S. company between June and December 2003; and copies of the company’s brochures and advertisements.

The petitioner re-submitted the majority of these documents in response to the director’s request for additional evidence that the petitioning company had been doing business for one year, and also included its quarterly wage report for the first quarter of 2004, and a copy of its 2003 corporate tax return.

The director denied the petition on December 15, 2004, concluding that the petitioner had not established that the U.S. company was doing business during the previous year. The director did not specifically reference any of the petitioner’s evidence or otherwise comment on this issue.

On appeal, counsel for the petitioner asserts that company submitted sufficient evidence to establish that the company was doing business since the approval of the beneficiary’s initial approval for L-1A classification in 2003.

Upon review, the AAO finds sufficient evidence to establish that the petitioner has been doing business since shortly following the approval of the initial "new office" petition. The director cited insufficient grounds to deny the petition on this basis, and her decision on this issue alone will therefore be withdrawn.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.